Universiti Islam Antarabangsa Malaysia v Nik Roskiman Abdul Samad & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R-25–229–08 OF 2015
AZIZUL AZMI ADNAN JC
20 MAY 2016

Civil Procedure — Certiorari — Application for — Application to quash award given by Industrial Court — Whether dismissal without just cause or excuse — Pleadings — Decision on matters not pleaded in first respondent's statement of case — Whether claimant is obliged to set forth relevant facts supporting his claim pursuant r 9(3) of the Industrial Court Rules 1967 — Whether Industrial Court exceeded bounds of pleadings — Burden of proof

The first respondent was employed by the applicant as an administrative officer and was offered the position of a lecturer subjected to the condition that he was to be on probation until he succesfully secured Phd degree. Subsequently, due to failure of the first respondent to fulfill the condition, the applicant terminated his services. The first respondent's dismissal was referred to the Industrial Court and the court found that the dismissal was without just cause and excuse. The court consequently ordered the applicant to pay backwages and compensation in lieu of reinstatement totalling RM44,844.14 to the first respondent. The court made a finding that the applicant had not given the first respondent the option to be appointed either as a matriculation teacher/lecturer or as an administrative officer, in accordance with the general terms and conditions of service and the University Services Circular No 1 of year 1997. Dissatisfied with the decision, the applicant brought the present action and sought the order of certiorari to quash the award given by the Industrial Court. The applicant contended that the learned chairman of the Industrial Court had committed an error of law when he considered matters that were not pleaded in the first respondent's statement of case. In reply, the first respondent contended that a party need not plead evidence; all that was required was for the party to plead the material facts of his case. The first respondent further contended that once the fact of dismissal had been proven, the evidential burden lay on the employer to satisfy the Industrial Court that the dismissal was not without just cause or excuse. The issue for determination was whether the Industrial Court exceeded the bounds of the pleadings.

Held, allowing the application with costs of RM3,000:

(1) The Industrial Court is bound by the four corners of the parties' pleadings, and cannot consider any evidence relating to any fact that has

not been made an issue by virtue of the pleadings. A party need not plead evidence; all that was required was for the party to plead the material facts of his case, nevertheless, in the present case, it was not the first respondent's pleaded case that the applicant had not given him the option to be appointed to the two alternative positions. This would have been a material fact had he chosen to make it the basis of his claim. Thus, the Industrial Court had committed an error of law by considering and making a determination based on matters not set out in the statement of case (see paras 16, 21–23 & 35).

(2) By virtue of r 9(3) of the Industrial Court Rules 1967, a claimant is obliged to set forth the relevant facts supporting his claim. The fact that the burden of proving that the dismissal was not without just cause or excuse lies on the employer does not absolve the employee of the obligation of putting forward an affirmative case, since it is the employee who has put into motion the claim by his representations to the director general for Industrial Relations pursuant to s 20 of the Industrial Relations Act 1967 (see para 31).

[Bahasa Malaysia summary

Responden pertama diambil bekerja oleh pemohon sebagai pegawai pentadbir dan ditawarkan jawatan pensyarah tertakluk kepada syarat bahawa dia diletakkan atas percubaan sehingga dia berjaya mendapat ijazah Phd. Kemudiannya, akibat kegagalan responden pertama untuk memenuhi syarat, pemohon menamatkan perkhidmatannya. Pembuangan kerja responden pertama dirujuk kepada Mahkamah Perusahaan dan mahkamah mendapati bahawa pembuangan kerja adalah tanpa sebab dan alasan adil. Mahkamah akhirnya memerintah pemohon untuk membayar gaji kebelakangan dan pampasan sebagai ganti pengembalian kerja berjumlah sebanyak RM44,844.14 kepada responden pertama. Mahkamah membuat dapatan bahawa pemohon tidak memberi opsyen kepada responden pertama untuk dilantik sama ada sebagai guru matrikulasi/pensyarah atau sebagai pegawai pentadbir, mengikut terma dan syarat perkhidmatan am dan Pekeliling Perkhidmatan Universiti No 1 Tahun 1997. Tidak puas hati dengan keputusan, pemohon membawa tindakan ini dan memohon perintah certiorari untuk membatalkan award yang diberikan oleh Mahkamah Perusahaan. Pemohon berhujah bahawa pengerusi yang bijaksana Mahkamah Perusahaan telah melakukan kesilapan undang-undang apabila beliau mempertimbangkan perkara yang tidak diplidkan di dalam pernyataan kes responden pertama. Dalam menjawab, responden pertama berhujah bahawa sesuatu pihak tidak perlu memplid keterangan; apa yang dikehendaki adalah bagi pihak tersebut memplid fakta kesnya. Responden pertama selanjutnya berhujah bahawa apabila saja fakta pembuangan kerja dibuktikan, beban keterangan terletak ke atas majikan untuk memenuhi Mahkamah Perusahaan bahawa pembuangan kerja adalah tanpa sebab dan alasan adil. Isu untuk

penentuan adalah sama ada Mahkamah Perusahaan melebihi batas pliding.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM3,000:

(1) Mahkamah Perusahaan adalah terikat oleh empat penjuru pliding pihak-pihak, dan tidak boleh mempertimbangkan apa-apa keterangan berkaitan kepada apa-apa fakta yang tidak dibuat isu mengikut pliding tersebut. Sesuatu pihak tidak perlu memplid keterangan; apa yang dikehendaki adalah bagi pihak tersebut untuk memplid fakta material kesnya, walau bagaimanapun, dalam kes ini, ia bukan kes yang diplidkan responden pertama bahawa pemohon tidak memberikannya opsyen untuk dilantik kepada dua jawatan alternatif. Ini akan menjadi fakta material jika dia memilih untuk membuatkannya asas tuntutannya. Oleh itu, Mahkamah Perusahaan telah melakukan kesilapan undang-undang dengan mempertimbangkan dan membuat penentuan berdasarkan perkara yang tidak dinyatakan di dalam pernyataan kes (lihat perenggan 16, 21–23 & 35).

(2) Mengikut k 9(3) Kaedah-Kaedah Mahkamah Perusahaan 1967, penuntut adalah bertanggungjawab untuk mengemukakan fakta relevan yang menyokong tuntutannya. Fakta bahawa beban pembuktian bahawa pembuangan kerja bukan tanpa sebab dan alasan adil terletak ke atas majikan tidak membebaskan pekerja daripada tanggungjawab mengemukakan kes afirmatif, memandangkan adalah pekerja yang mengusulkan tuntutan tersebut melalui representatifnya kepada Ketua Pengarah Perhubungan Perusahaan berikutan kepada s 20 Akta Perhubungan Perusahaan 1967 (lihat perenggan 31).]

Notes

For cases on application for certiorari, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 2106–2114.

Cases referred to

Superintendent of Lands and Survey (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 AMR 1882; [1994] 3 CLJ 567; [1994] 1 MLRA 300, SC (refd)

Goon Kwee Phoy v J& P Coats (M) Bhd [1981] 2 MLJ 129; [1981] 1 MLRA 415, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 1 AMR 1008; [1997] 2 CLJ 11; [1996] 2 MLRA 398, SC (refd)

National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144; [2000] 2 AMR 1387; [2000] 1 CLJ 681; [1999] 1 MLRA 656, CA (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2009] 5 MLJ

770; [2010] 1 AMR 523; [2010] 3 CLJ 310; [2009] 3 MLRA 597, CA (folld)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2011] 3 AMR 38; [2010] 8 CLJ 629; [2010] 5 MLRA 696, FC (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(1), 30(5)
Industrial Court Rules 1967 r 9(3)
Rules of Court 2012 O 53 r 3(2)

P Thavaselvi (Zul Rafique & Partners) for the applicant.
Ragunath Kesavan (Izzy Nabil with him) (Kesavan) for the respondents.

Azizul Azmi Adnan JC:

INTRODUCTION

[1] The applicant, University Islam Antarabangsa Malaysia ('UIA' or 'the university'), sought for order of certiorari to quash an award of the Industrial Court made in favour of the first respondent, En Nik Roskiman Abdul Samad, a former employee of UIA.

BACKGROUND FACTS

[2] The material background facts of this case are as follows.

[3] En Nik was appointed as an administrative officer of the university on 14 November 2002. On 25 June 2003, he was appointed as a lecturer. The letter by which he was appointed as lecturer incorporated by reference a number of other documents, including the general terms and conditions of service and the University Services Circular No 1 of year 1997 ('the 1997 circular').

[4] The general terms and conditions of service provide that En Nik was to be on probation until he has successfully secured a PhD degree in a relevant field.

[5] The material portion of the 1997 circular is set out below:

> (ii) Staff members who failed to upgrade their study programme from MPhil to that of PhD or failed at their Master's degree level are to be given the following options:
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> (a) To be appointed as Matriculation Teacher/Lecturer on salary grade of DG3; or

A (b) To be appointed as Administrative Officer based on the need of the University;

(iii) Should the above options as in para (ii)(a) or (b) be not agreeable either to the University or the staff concerned, the University has the right to terminate the service of staff.

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[6] En Nik was subsequently offered the opportunity to pursue a doctorate course at the University of Edinburgh. The terms on which he was to pursue his PhD was set out in a document titled acceptance of offer of study leave dated 20 May 2004 and a study leave agreement dated 16 July 2004. Both these documents provide for the right of the university to terminate En Nik's employment should he fail the course.

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[7] Although En Nik completed his doctoral thesis, he was not able to successfully defend it at the viva conducted with an external examiner because of — according to En Nik's testimony — differences in opinion on how the Islamisation of the Malay world took place. He was instead awarded an M Phil degree, and not the desired D Phil.

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E **[8]** En Nik's appeal against this decision was unsuccessful.

[9] On 29 October 2008, the university terminated his employment as a lecturer.

F BEFORE THE INDUSTRIAL COURT

[10] En Nik lodged a complaint with the Director General of Industrial Relations under s 20(1) of the Industrial Relations Act 1967. His complaint was eventually referred to the Industrial Court, which held that En Nik had been dismissed without just cause or excuse and ordered UIA to pay back wages and compensation in lieu of reinstatement totalling RM44,844.14.

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Whether the industrial court exceeded the bounds of the pleadings

H **[11]** It was advanced by Ms Thavaselvi, counsel for UIA, that the learned chairman had committed an error of law when he considered matters that were not pleaded in the claimant's statement of case. Principal among these was the 1997 circular, which was referred to in paras 35–38 of the award.

I **[12]** The learned chairman made a finding that UIA had not given the claimant the option to be appointed either as a matriculation teacher/lecturer

or as an administrative officer, in accordance with the terms of the 1997 circular. This, among other reasons, were factored into the conclusion by the Industrial Court that the dismissal of the claimant was without just cause or excuse.

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PLEADINGS IN INDUSTRIAL COURT CASES

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[13] The general rule that parties are bound by their pleadings apply in Industrial Court cases as they do in other civil cases. There is, however, one important difference.

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[14] In civil cases, where a party seeks to adduce evidence that is variance with his pleaded case, the opposing party must immediately object to the tendering of such evidence. Having failed to do so at trial will mean that the opposing party cannot later object to the evidence on basis that such evidence departs from his opponent's pleaded case.

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[15] The authority on this issue is the Supreme Court case of *Superintendent of Lands and Survey (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 AMR 1882; [1994] 3 CLJ 567; [1994] 1 MLRA 300. The relevant passages bear setting out in full:

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> Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. *Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the instant appeal.* In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.
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> Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing

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from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong, and John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured. (Emphasis added.)

[16] This exception to the general rule that parties are bound by their pleadings does not, however, apply to Industrial Court cases. The Industrial Court is bound by the four corners of the parties' pleadings, and cannot consider any evidence relating to any fact that has not been made an issue by virtue of the pleadings. It appears that this is the case even though the evidence may have been admitted without objection, and even if the point had been fully ventilated in arguments.

[17] The authority for this principle is *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2009] 5 MLJ 770; [2010] 1 AMR 523; [2010] 3 CLJ 310; [2009] 3 MLRA 597 (CA). At the Court of Appeal, Low Hop Bing JCA stated the following:

[19] Our analysis of the judgment in *Superintendent of Lands & Survey (4th Div) & Anor v Hamit bin Matusin & Ors* shows that it was not concerned with the construction of s 30(5) and r 9. Instead, it revolves around the procedure generally applicable to ordinary civil litigation. It does not relate to the specialised domain of industrial jurisprudence.

[20] With particular reference to industrial jurisprudence, there are two weighty authorities, of the (then) apex court, which reflect the second school of thought, and at variance with the approach adopted in *National Union of Plantation Workers*. The first is R Rama Chandran, where the Industrial Court did not consider the issues raised in the parties' pleadings. At p 178b–d (MLJ); p 162b–e (CLJ), Eusoff Chin CJ (Malaya) (as he then was) set out the relevant principle as follows:

It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of

conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must all times keep itself alert to the issues and attend to matters it is bound to consider.

[21] The second authority was established by another coram of the (then) Supreme Court in *Kumpulan Perangsang Selangor Bhd*, which followed the principle propounded in R Rama Chandran. There, the Industrial Court had acted on a ground which was not advanced in the pleaded case. The award by the Industrial Court was quashed: per Gopal Sri Ram JCA (now FCJ) speaking for the (then) Supreme Court at p 801F–H.

[22] The existence of the two different schools of thought makes it imperative for us to indicate our choice for the better view. With respect, we subscribe to and agree with the principle propounded in the second school of thought which sets out the correct judicial approach relating to the specialised domain of industrial jurisprudence.

[18] The correctness of this decision was affirmed by the Federal Court (*Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2011] 3 AMR 38; [2010] 8 CLJ 629; [2010] 5 MLRA 696 (FC)).

[19] This court is of course bound by the decisions of the Court of Appeal and Federal Court. Two observations may however be made regarding the case of *Ranjit Kaur v Hotel Excelsior:*

(a) first, the Court of Appeal found that the Industrial Court not only erred in making a determination based on an unpleaded case but also that there was in fact no evidence to support the issue of victimisation. It would follow that, if no evidence regarding victimisation had been advanced, there would have been no question of there being any failure to object on the part of the counsel for the hotel. Contrast this with the case of *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 2 AMR 1387; [2000] 1 CLJ 681; [1999] 1 MLRA 656, where the Court of Appeal found that, although the issue of waiver and condonation had not been pleaded, it was fully argued both before the Industrial Court and the High Court, and therefore it was too late in the day for the employer to contend that the issue could not be relied upon by the employees. It will be apparent that the factual circumstances in *Ranjit Kaur v Hotel Excelsior* were quite different from the cases *Superintendent of Lands & Survey v Hamit bin Matusin* and *National Union of Plantation Workers*, where there had been failures to object to the adduction of evidence at variance to the

pleadings and where the arguments on the unpleaded issues had been fully ventilated. In other words, *Ranjit Kaur v Hotel Excelsior* could have been decided without departing from the ratio decidendi in the two earlier cases (on the basis that the Industrial Court had erred in law by making a finding that was not supportable by the available evidence); and

(b) second, the sum effect of the decision in *Ranjit Kaur v Hotel Excelsior* is that we have a stricter rule regarding pleadings applicable in industrial relations cases compared to the rule applicable to civil cases generally, despite s 30(5) of the Industrial Relations Act 1967, which empowers the Industrial Court to prioritise substance over legal form.

DID THE INDUSTRIAL COURT EXCEED THE BOUNDS OF THE PLEADINGS?

[20] It was not in dispute that the 1997 circular had been incorporated by reference by both the letter of appointment dated 25 June 2003 and the general terms and conditions of service. It was also not in dispute that, as a matter of fact, the claimant was not given the option to continue either as a matriculation teacher/lecturer or an administrative officer.

[21] Mr Kesavan, counsel for En Nik, argued that a party need not (and indeed must not) plead evidence; all that is required is for the party to plead the material facts of his case.

[22] While Mr Kesavan is entirely correct on the law in this regard, En Nik's complaint was not that he was not given the option to be appointed as a matriculation teacher/lecturer or an administrative officer. As can be seen from his statement of case (see paras 14 and 15 of the statement of case, at p 3 of encl 3), En Nik's grouse was twofold: first was that there was purported inaction on the part of UIA, which amounted to condonation and acceptance of the breach; and secondly, that there had been a 'double practice' where a former colleague had been treated differently from him. Nowhere in the statement of case did En Nik complain that he had not been given the option to continue in the two alternative positions. Indeed, based on his own testimony at trial, En Nik was of the view (mistakenly held, as we shall see later) that the option to appoint him to the alternative positions was entirely at the discretion of UIA. If this was the view that he held, then it would follow that he could not have claimed that UIA was under an obligation to give him the option to be appointed to the two alternative positions (as was held by the learned chairman).

[23] In short, it was not En Nik's pleaded case that UIA had not given him the option to be appointed to the two alternative positions. This would have been a material fact had he chosen to make it the basis of his claim.

[24] The learned chairman nonetheless considered the effect of the 1997 circular and came to the finding (among others) that: (a) the options referred to in the 1997 circular had not been given to the En Nik; and (b) there was no evidence to establish that UIA had even considered the options in the 1997 circular before dismissing him. For these reasons, the Industrial Court found that his dismissal was without just cause or excuse.

[25] In my judgment, this amounted to an error of law because, based on the decisions of the Court of Appeal and the Federal Court *Ranjit Kaur v Hotel Excelsior* discussed, the Industrial Court may not depart from the pleadings, even if the evidence that was at variance with the pleadings had been adduced without objection, and even if the unpleaded point had been fully argued before the Industrial Court.

[26] In response to a query from this court, counsel informed the court that an objection had been raised on the relevance of the 1997 circular at the outset of the hearing before the Industrial Court. However, the existence of such objection is immaterial, as Industrial Court proceedings are subject to the stricter rule of pleadings according to *Ranjit Kaur v Hotel Excelsior,* as discussed at paras 11–19.

[27] Mr Kesavan also advanced the following argument. In Industrial Court cases, once the fact of dismissal had been proven, the evidential burden lay on the employer to satisfy the Industrial Court that the dismissal was not without just cause or excuse. Accordingly — argued Mr Kesavan — the Industrial Court can rightfully take into account any fact before it in order to ascertain, firstly the applicable terms of employment, and secondly whether there has been a breach of those terms as would entitle the employer to terminate the services of the employee.

[28] This argument raises an important point of adjectival law. It is for the employer to prove that the dismissal was not without just cause or excuse. The employee bears no burden to disprove this fact. The following dicta of Raja Azlan Shah CJ (Malaya) in *Goon Kwee Phoy v J& P Coats (M) Bhd* [1981] 2 MLJ 129; [1981] 1 MLRA 415 is instructive:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with

A or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason B advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[29] Thus, if the employer fails to establish just cause or excuse, it must necessarily follow that the case for the employee would have been made out. C That would be the end of the matter, and there would be no further need for the Industrial Court to examine if the affirmative case put forward by the employee has been established.

D **[30]** Now, in an ordinary civil action, a defendant need not advance an affirmative defence; he may simply step back and put the plaintiff to strict proof of the matters claimed. If he does so, however, he will be precluded from adducing evidence at trial of an affirmative defence, since to do so would deny the plaintiff of advance notice of the position taken by the defendant.

E **[31]** In my view, this modality does not exist for an employee in an action pursuant to a reference to the Industrial Court under the Industrial Relations Act 1967. By virtue of r 9(3) of the Industrial Court Rules 1967, a claimant is obliged to set forth the relevant facts supporting his claim. The fact that the F burden of proving that the dismissal was not without just cause or excuse lies on the employer does not absolve the employee of the obligation of putting forward an affirmative case, since it is the employee who has put into motion the claim by his representations to the director general for Industrial Relations pursuant to s 20 of the Industrial Relations Act 1967.

G **[32]** Thus, it will not be open to an employee to simply state that he will put the employer to strict proof of the existence of a just cause or excuse. He must put forward an affirmative case as to why his dismissal was not based on a just H cause or excuse.

[33] Once the Industrial Court had made a determination that there has been a dismissal, it will go on to consider whether the employer's case has been made out. From here, there are several possible outcomes. It may simply decide I that the employer's case has not been proven, in which case it must find for the employee. It may also come to certain positive findings in favour of the employee, in which case those findings must be based on the employee's pleaded case.

[34] In the present instance, the Industrial Court would be entitled to come to a finding that the dismissal was without just cause or excuse provided that the factual basis for that finding was pleaded in the statement of case. It is true that En Nik need not have pleaded the existence of the 1997 circular, for that would be an item of evidence and not fact. Nonetheless, he would have had to assert that he had a right to be offered employment in the alternative positions in accordance with the terms of his employment. This he did not do. It was not for the Industrial Court to shore up any defect in the statement of case or to make a determination that strayed beyond the four corners of the pleadings.

THE OTHER GROUNDS

[35] As I have come to the finding that the Industrial Court had committed an error of law by considering and making a determination based on matters not set out in the statement of case, it will not be strictly necessary for me to deal specifically with each of the other grounds upon which the applicant sought to quash the award. I wish however to deal with the following three matters.

[36] The first is to remark that it is to a certain extent understandable that, in advancing the case for their clients, advocates often act in an abundance of caution, and adopt what may be termed as a shotgun approach in submissions and, as in this case, in drafting statements pursuant to O 53 r 3(2) of the Rules of Court 2012. In my judgment, counsel would do well to guard against the temptation to raise points indiscriminately. It is never the case that, the more points are raised, the more likely it is that a court may find favour with one of them, particularly when, if hand were to be put on heart, counsel would acknowledge that an argument had been made more in hope than with conviction.

[37] Second, Ms Thavaselvi sought to argue that the study leave agreement (p 85 of encl 3), read together with the acceptance of offer of study leave (p 99 of encl 3), operated to supersede the 1997 circular. In my judgment, there is nothing in the study leave agreement or the attached acceptance (which sought to impose additional conditions) that expressly overrides or disapplies the 1997 circular. Nor is there anything in them that could be said to be inconsistent with the existence of an option to be given to staff members to be employed in the alternative positions as referred to in the 1997 circular. Accordingly, it is my view that the right of UIA under the study leave agreement to terminate the employment of En Nik must be read subject to the provisions of the 1997 circular, the legal effect of which is considered below.

[38] Third, I am of the view that, based on the proper construction of 1997 circular, UIA was under an obligation to give the option to En Nik to be appointed to either one of the two alternative positions referred to in 1997 circular. The reasons are as follows:

(a) first, the words 'are to be given' in the second line of sub-para (ii) are peremptory in nature, and is indicative that it was intended to create a right for the benefit of the staff members in question;

(b) secondly, an 'option' is conventionally construed as something conferring rights but not imposing any obligation. As such, the word in sub-para (ii) had the effect of granting a right to the affected staff members to be appointed to the two alternative positions. However, the staff member in question would be free to opt not to be appointed to those positions; and

(c) finally, even though the words in sub-para (iii) appear to suggest that two options are subject to the agreement of both UIA and the staff concerned, this construction would militate against the very concept of an 'option'. If the decision to appoint is subject to the sole discretion of the university, it would follow that the affected staff members would not have any right to be appointed to any of the two alternative positions, and hence no option would exist in their favour. In order to avoid this inconsistency, the proper construction of the 1997 circular is that the options must be given to the affected staff members, but subject to terms as may be determined by the university. If the staff member does not agree to these terms, the university may terminate the service of the staff.

[39] Now, there is evidence to the effect that En Nik was of the view that the appointment to the two alternative positions was entirely subject to the discretion of UIA. From the preceding paragraphs, it will be clear that he was mistaken in this belief. However, that he held this mistaken belief is immaterial in determining the rights and obligations of the parties, as that is a question of law, to be determined based on the proper construction of the terms of the employment contract. Based on a proper construction of the 1997 circular, which has been incorporated by reference into the employment contract, the failure to give the option to En Nik to continue in employment either as a matriculation teacher/lecturer or as an administrative officer amounted to a breach of the terms of his employment.

[40] The Industrial Court was therefore not incorrect in holding that the dismissal would have been without just cause or excuse (although not for the reasons explained in the award). Unfortunately for En Nik, the decisions of

both the Court of Appeal and of the Federal Court in *Ranjit Kaur v Hotel Excelsior* would not have permitted the Industrial Court to come to a finding based on unpleaded facts.

[41] It will be seen that, in parsing the terms and conditions of the employment contract, this court has ventured into an analysis of the correctness of the decision of the Industrial Court. This should not be taken to mean that this court is exercising anything more than its supervisory powers. It will sometimes be necessary to delve into the substantive merits of a case in order to determine whether, for example, the law had been correctly applied, or whether a reasonable tribunal, similarly circumstanced, could have come to the same decision. Guidance in this regard can be obtained from the following dicta of Sri Ram JCA in the Supreme Court decision of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 1 AMR 1008; [1997] 2 CLJ 11; [1996] 2 MLRA 398:

> An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in certiorari proceedings.
>
> Of course, there may be cases in which — for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule.
>
> The present case does not fall within any of the exceptions we mentioned a moment ago. The learned judge was therefore entitled — indeed, he was under a duty — to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like conclusion. There was, therefore, no misdirection in law by the learned judge upon the basis of intervention and no transgression of the prescribed parameters of judicial review. For these reasons, we entertain no difficulty in rejecting the first submission advanced on the appellant's behalf.

[42] For the reasons explained earlier, I allow the application for certiorari to quash the affected award of the Industrial Court. The first respondent is to pay costs of RM3,000.

A *Application allowed with costs of RM3,000.*

Reported by Dzulqarnain Ab Fatar

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